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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Promotion of Competitive Networks	)	
in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association	)	
International, Inc. Petition for Rulemaking	)	
to Amend Section 1.4000 of the Commission's	)	
Rules to Preempt Restrictions on Subscriber	)	
Premises Reception or Transmission Antennas	)	
Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making and	)	
Amendment of the Commission's Rules	)	
to Preempt State and Local Imposition of	)	
Discriminatory And/Or Excessive Taxes	)	
and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

INITIAL COMMENTS
OF
RCN TELECOM SERVICES, INC.

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October 12, 1999

SUMMARY

RCN, one of the nation's largest competitive suppliers of integrated telecommunications and video distribution services, urges the Commission to issue a Notice of Proposed Rulemaking that would propose the adoption of a public right-of-way ("PROW") Access Policy Statement. Like a great many other CLECs and competitive providers of video distribution services, RCN has experienced a wide variety of difficulties in seeking access to local PROW facilities. These difficulties have ranged from excessive delays, to the attempt to extract excessive use fees, to refusals to treat incumbents in the same fashion as proposed for RCN, to local efforts to regulate interstate telecommunications, and, not least, to wide variation in local policy and practice. These factors have materially slowed RCN in the build-out of its state-of-the-art fiber optic plant, added substantially to its overhead and construction expenses, and impaired the design and construction of integrated or unified systems in multi-jurisdictional settings such as that in the Washington, D.C. metropolitan area.

The PROW Access Policy Statement should set forth certain basic principles, including the right of every certified competitor to fair use of PROW, rapid action on applications for PROW access, equality of terms and conditions with other users, and fees based strictly on a reasonable allocation of incremental costs incurred for the consideration of a PROW access application and a fair share of the cost of the administration of local PROW facilities.

The Policy Statement should also preempt all conflicting or inconsistent state or local law, policy, regulations or practices. Federal preemption is eminently appropriate for a national policy concerning access to local PROW since the fundamental federal policies embodied in the Telecommunications Act of 1996 are imperiled by the existing patchwork of local rules and practices.

The Commission has ample statutory authority to adopt a federal policy for access to local PROW, and to preempt conflicting local policies or practices to the contrary. Under § 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, § 1 of the Act, 47 U.S.C. § 151, and §§ 4(i) and 303 (r), 47 U.S.C. §§ 154(i) and 303 (r), the Commission has a very broad repository of statutory authority to develop national competitive telecommunications policy, and to implement that policy by preempting conflicting or inconsistent state or local law.

In its recent comments and reply comments in the MTE Inside Wiring portion of this proceeding, RCN contended that fair access to the 30% of the market represented by end-users living in MTEs is crucial for the fullest possible development of a competitive policy, notwithstanding the reluctance of the incumbent carriers and building owners to open up their facilities or to relinquish their monopoly control over the MTE market. Exactly the same is true in the case of access to PROW. Unless the Commission acts decisively to compel local PROW administrators to develop competitively neutral and nondiscriminatory PROW access policies, and to compel adherence to such policies, the Congressional intent to encourage competition will be significantly thwarted.

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INITIAL COMMENTS
OF
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RCN Telecom Services, Inc. ("RCN"), by undersigned counsel, hereby submits its Initial Comments in the Notice of Inquiry portion of the above-captioned proceeding.[1/] RCN, which requires access to public rights-of-way ("PROW") both as a telecommunications carrier and as a multichannel video programming distributor, welcomes the opportunity to set forth its experiences and recommendations with respect to access to PROW, an element of the

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[1/] *Notice of Inquiry on Access to Public Rights-of-Way and Franchise Fees*, FCC 99-141 (rel. July 7, 1999), issued *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, as supplemented by Order Extending Pleading Cycle, DA 99-1563, *rel.* August 6, 1999.

competitive market environment that is crucial for the rapid and effective development of both facilities-based CLEC and MVPD competition and, which heretofore has received less focused attention from the Commission than its importance merits.

I. BACKGROUND

RCN most recently set forth its current circumstances in Comments and Reply Comments in the Commission's annual assessment of competition in the MVPD market, and in Comments and Reply Comments in the NPRM stage of the present docket.[2/] In brief, RCN is developing an integrated offering of local exchange and interexchange telephony, high-speed Internet access, and video distribution, largely to residential subscribers located in the Northeast corridor and in the San-Francisco to San Diego corridor. It is constructing its own state-of-the-art broadband fiber optic network and is certificated as a CLEC in 15 states, and is offering CLEC services in Massachusetts, New York, New Jersey, Pennsylvania, Maryland, the District of Columbia, and Virginia. It offers both traditional franchised cable and Open Video Service ("OVS") in three large East Coast metropolitan areas and is actively building out its fiber optic plant in numerous others. RCN currently has over 900,000 service connections, and is adding telephone, internet and video customers rapidly.

In all these roles RCN must have access to PROW. To date, RCN has negotiated dozens of agreements with local authorities for the use of such PROW, and is actively negotiating others. Hundreds of additional agreements will be required for the use of PROW as RCN seeks

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[2/] *See* RCN Comments and Reply Comments in Docket No. 99-230, filed August 6, and September 1, 1999 and Comments and Reply Comments in the instant proceeding, filed August 27, 1999 and September 27, 1999.

to become one of the nation's most significant CLEC and MVPD competitors. RCN's recent Comments and Reply Comments in the NPRM stage of this proceeding emphasized the importance of full and equitable access to inside wiring located in the MTE segment of the market, which is currently estimated to be about 30%. RCN suggested that the Commission declare a basic right of access to such environments, the Federal Mandatory Access Requirement ("FMAR"), with three subprinciples: the End-User Principle, the Services Provider Principle, and the MTE Owner Principle. The purpose of adopting such basic policy statements is to recognize the importance of the MTE segment in the overall marketplace, and to declare that end-users in MTEs, certificated carriers wishing to provide service to them, and MTE owners, have certain rights and correlative obligations, as a predicate for more detailed rules and regulations.

It is crucial that the Commission do essentially the same in the context of access to PROW. Like other CLECS and video carriers, RCN has experienced countless delays, expense, and difficulties in securing access to PROW. While it is understandable that public authorities wish to develop opportunities to enlarge public coffers, RCN respectfully suggests that in a great many cases these efforts have become so intense that the competitive marketplace envisioned by the Telecommunications Act of 1996 (the "Act") is jeopardized. At the very least the long delays and unanticipated fees imposed by a variety of PROW administrators are significantly delaying the development of competitive services. RCN has frequently encountered such problems in its attempts to negotiate PROW access agreements, and has also experienced a wide variety of delays, unreasonable conditions, and other impediments to the efficient construction and implementation of its network. Absent a strong assertion of federal authority preempting

conflicting or inconsistent local access regulations and establishing uniform rules and standards for local PROW access, the problem is likely to remain. The Commission must act, and act quickly, to remove or ameliorate this significant barrier to competition.

II. FCC ACTION IS REQUIRED TO ASSURE RAPID, EQUITABLE, COST-BASED AND UNIFORM ACCESS TO PROW

In numerous decisions interpreting § 253 of the Act, the Commission has established certain principles and guidelines.[3/] RCN has found these Commission decisions helpful in negotiating with local authorities, but, unfortunately, they are not sufficiently proscriptive of contrary views or activities at the local level. Taken together with a variety of judicial decisions, there remains sufficient latitude for PROW administrators to bob and weave in their efforts to preserve or expand local regulatory oversight, or to seek maximum revenue advantage or other beneficial terms in granting access. Moreover, while local authorities are generally and in the abstract in favor of local competition in telecommunications and video distribution, their almost limitless ability to delay granting access rights to new competitors until they can secure the very favorable terms they seek, gives them an enormous advantage over a commercial party for whom speed to market is crucial. The result is that RCN is often forced to accept terms and conditions that it believes are not only violate of the Act but are simply unfair and commercially oppressive.

The difficulties encountered by RCN fall into the following broad categories:

[3/] Cases collected in the NOI, ¶¶ 75-76.

A. Inaction or Delayed Action

In many cases the principal problem has been that local authorities vested with the responsibility and obligation to grant access to local PROW are not certain how to proceed with respect to competitive telecom or video distributors. Their prior experience has not encompassed the issues of numerous carriers seeking access to the PROW. These issues encompass coordination of numerous carrier requests, the need for rapid determinations, and the need to assure equality in establishing access rights. The result is often substantial delay and occasionally such delay amounts to inactivity altogether.

B. Setting Access Fees

Many local authorities appear to believe that the newly competitive telecommunications industry is an appropriate source from which to extract substantial revenues. While some jurisdictions have accepted the notion that fees should be based only on the costs to the local government of supervising access, providing the requisite support, maintaining records, or repaving streets, others ask for access fees, both in cash and in services, which grossly exceed any conceivable cost to the government and which are, pure and simple, revenue generators.

C. Equality of Fees and Access

The equality of access issue arises most commonly in the context of a new competitor wishing to have use of the PROW to compete with the ILEC which, of course, is already using such PROW ubiquitously. Because the cost of installing distribution plant is one of the major elements of a new entrant's cost structure, it is important that access to PROW be established on an equitable basis. If the ILEC's plant uses PROW without making any payments therefor, or if

such payments are nominal, then competitors should not be asked to pay more. Some local authorities take the position that they would like to charge the ILEC as much as they propose to charge the new competitor (although virtually never that the new competitor should have access at the same nominal level as the ILEC), but cannot do so because existing law or practice precludes increasing charges to the ILEC.[4/] In many instances, RCN has been asked to use underground ducts rather than aerial distribution for aesthetic reasons. At the same time, existing carriers or MVPDs, with whom RCN proposes to compete, are allowed to continue use of the less expensive aerial routes and even, in some cases, to use poles for expansion while RCN is asked to construct its new facilities entirely underground.

D. Variations In Local Practice

In addition to the foregoing, the enormous variation in local practice creates substantial burdens, delays, and costs for the new competitor. A carrier like RCN, which seeks to provide service in hundreds of locations, must deal with an equal number of local authorities, essentially each of which has its own procedures, priorities, and approaches to setting rates, terms and conditions. Understandably, such variation is endemic to the geographical diversity involved in establishing a wide-spread system, and total uniformity cannot be expected. But the variation which does exist is so substantial that it has become a significant barrier to the rapid and effective development of competition. Not only does wide variation in policy and practice lead to differences in the time required to secure access to PROW, but in many instances contiguous

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[4/] See, for example, the Comments of the Department of Information Technology and Telecommunications of the City of New York, filed in this proceeding on August 13, 1999.

communities, by requiring RCN to follow wholly dissimilar procedures, have delayed the inauguration of service not only in their own communities but in neighboring ones as well.

E. Unnecessary Or Burdensome Application Procedures

In many jurisdictions RCN has encountered efforts to secure information from an applicant for PROW access that goes well beyond any legitimate local governmental interest. Matters such as corporate history, the types of service to be provided, other service areas being served and the like are simply irrelevant to a PROW access request. RCN recognizes that certain inquiries are legitimate: local government is entitled to solicit information on the basis of which it can inquire about the applicant's prospects for paying fees, or whether it has been previously found responsible with respect, for example, to performing excavations or following standard safety procedures. The scope of such inquiries, however, must be carefully defined by rule and broader inquiry prohibited.

III. THE COMMISSION SHOULD ADOPT A PROW ACCESS POLICY STATEMENT INTERPRETING § 253 OF THE ACT, INCLUDING PREEMPTION OF CONFLICTING OR CONTRARY INTERPRETATIONS

As indicated above, and indeed as the Commission well knows, there are already numerous Commission and judicial interpretations of the meaning, scope, and effect of § 253 of the Act. RCN believes, however, that it is necessary for the Commission to initiate a Notice of Proposed Rulemaking to propose a broad and comprehensive interpretation of § 253. Such an interpretation should be based on the creation of a full record including detailed analysis of § 253, prior Commission decisions, and those of various judicial bodies. This is the best method by which the proliferation of conflicting or mutually inconsistent interpretations can be

controlled and erroneous interpretation curtailed. RCN suggests that, as in the case of MTE inside wiring, the Commission should adopt a Policy Statement that can serve as a comprehensive interpretation by the Commission of the meaning, scope, and effect of § 253. The Commission should also use its Policy Statement to preempt contrary or conflicting local rules, policies, or procedures.

To justify such action the Commission need not rely on the self-interested and anecdotal complaints of municipal abuse of PROW applicants submitted to the Commission in the filings of various CLECs or trade associations. On August 13th, 1999 the City of New York, through its Department of Information Technology and Telecommunications ("DITT"), filed comments in this proceeding in which it set forth at length its interpretation of § 253 and commented on a number of judicial interpretations of that section. RCN disagrees fundamentally with most of the interpretive views advanced by DITT in that filing. Specifically, RCN believes that DITT is wrong in asserting that under § 253, properly construed, it retains a large measure of local autonomy in granting access to PROW within New York City. DITT is similarly wrong in asserting that local governments can seek rent for the use of their property "in whatever manner is best tailored to the specific needs of their jurisdiction..." and that taking account of the competitively neutral and nondiscriminatory requirements set forth in § 253 (c) does not preclude treating differently incumbents and the array of competitors seeking to use PROW. DITT concludes that § 253 "affords local governments maximum flexibility to address their unique

situations on a case-by-case basis, consistent with the goals of the Act."[5/] RCN believes these views are inconsistent with both the language and purpose of § 253. That they are articulated by a municipal government as important as that of New York City emphasizes the need for the Commission to definitively construe § 253 and to establish and enforce federal policy which precludes such views.

A. The Commission's Policy Statement Should Consist, At A Minimum, Of The Following Elements:

1. Local Fees for Access to PROW Must Be Based on Costs Incurred by Local Governments.

RCN does not suggest that local government should subsidize commercial access to PROW. All legitimate costs should be compensable, including administration of the PROW management program, incremental costs for street repair, public safety, traffic management, additional staff, public hearings or record keeping, and the like. The approach to cost allocation, however, should be principled, based on incremental costs, and it should be the same everywhere. Indeed, cost allocation in this context should follow principles essentially identical to TELRIC,[6/] or to collocation cost allocation.[7/] The Commission should invite proposals both

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[5/] Comments of DITT, at i to ii. DITT also contends, *inter alia*, that "local governments must have considerable discretion in deciding what form of fair and reasonable compensation best suits their local needs, including obtaining rent for the use of their property" and that this rent can be calculated as a percentage of gross revenue." *Id.*, at 2-3.

[6/] *See* 47 C.F.R. §§ 51.503, 51.505.

[7/] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761 (1999), ¶¶ 50-51.

from the commercial sector and from local governmental authorities and adopt rules establishing the relevant cost allocation principles. Apart from the establishment of relevant cost principles, the Commission should once and for all reject the notion that PROW access fees can be a source of revenue generation beyond allocable costs, and may be related to revenue generated by a PROW user, or to any other factor exogenous to the provision by local government of PROW access.

2. The FCC Should Mandate Time Periods For Responding to PROW Access Requests

Because delay at the local level is pervasive, virtually impossible for a private party to control, and very harmful to a new entrant, RCN suggests that the FCC adopt schedules governing a local government's response to a PROW access request. The period established should be reasonable, taking into account the need in many communities for coordination among diverse elements of local government, or the need for hierarchical review. As a point of departure for further consideration, RCN would suggest that local authorities be required to make an access decision within 30 days of the receipt of a formal application, with one 30 day extension for good cause. Importantly, however, the period by which a decision can be expected should be set forth in the Commission's rules and binding on the local government, subject only to a limited right to seek an extension of time based on unavoidable factors. In such cases the burden of proof should be placed on the party seeking delay of an established deadline to justify such action.

3. The Permissible Contents Of A PROW Access Request Should Be Defined

To avoid the burdens often imposed by complex and overly-detailed application forms, RCN suggests that the Commission define with some precision what data a PROW administrator may seek in the consideration of an access request. Again, any data reasonably related to the legitimate concerns of such administrators should be permissible, but extraneous or excessive information should be disallowed. Nor is this simply a matter of avoiding excessive paperwork. On the contrary, the Commission must make unequivocal in its Policy Statement that local PROW administrators do not have authority to regulate competitive interstate telecommunications or MVPD suppliers: their authority begins and ends with management of local PROW, and may not intrude into the regulation of the offering of telecommunications or, subject to Title VI of the Act, MVPD services.[8/]

4. PROW Access Must Be Competitively Neutral And Nondiscriminatory

Section 253 of the Act, of course, establishes a broad statutory requirement that state and local governments may not prohibit, or adopt rules or policies having the effect of prohibiting, the provision of competitive telecommunications services. It also specifies that state and local governments retain the right to manage PROW and to require fair and reasonable compensation, on a competitively neutral and nondiscriminatory basis, for use of such PROW on a

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[8/] In *Bell Atlantic-Maryland v. Prince George's County, Maryland*, 1999 WL 343646 (D. Md.), the court recited the detailed oversight of entities proposing to use PROW in that jurisdiction. *See* slip op. at 1-2. Such inappropriate intrusions into regulation by a third layer of regulators must be controlled and a broad Policy Statement is a more appropriate place to do so than in an adjudicatory matter.

nondiscriminatory basis.[9/] The precise meaning of this provision has not been definitively settled. The Commission has interpreted it, together with § 253(a), to mean that state and local governments must assure that access to PROW is available on a competitively neutral and nondiscriminatory basis.[10/] The U.S. District Court in Baltimore appears to agree with this broad interpretation of § 253.[11/] On the other hand, the Court of Appeals for the First Circuit has indicated, albeit in *dicta*, that the competitively neutral language probably does not apply to access, but only to the terms of payment.[12/] In any event, it is appropriate for the Commission to squarely face this issue, and to make its own definitive determination as to the meaning of § 253.[13/] Any such interpretation of its own organic statute is, of course, entitled to substantial judicial deference. *Chevron USA, Inc. v. National Resources Defense Council, Inc.* 467 U.S. 837 (1984). In light of the prevalence of ILEC reliance on PROW, RCN believes the Congress simply must have intended to provide that PROW administrators must treat ILEC and CLEC competitors with strict equality in respect to access to, and use of, PROW.

[9/] 47 U.S.C. § 253(c).

[10/] *See, e.g., In re TCI Cablevision of Oakland County, Inc.,* 12 FCC Rcd 21396 (1997).

[11/] *See Bell Atlantic-Maryland v. Prince Georges County, supra,* slip op. at 10-11.

[12/] *Cablevision of Boston v. Public Improvement Commission of Boston,* 184 F. 3d, at 88 (1st Cir., 1999).

[13/] RCN is fully aware of the *TCI Cablevision* decision cited *supra.* However, given the widespread scope of the PROW access issues, RCN urges the Commission to initiate a new, broader-based proceeding rather than to rely on an early interpretation of § 253 which arose in the context of an adjudicatory matter and accordingly is not the most appropriate basis for the development of a major policy statement.

B. The Policy Statement Should Preempt Conflicting Or Inconsistent Local Access Procedures

Given the national scope of the problems presented by competitive carriers' access to local PROW, and the variety of local policies and procedures, it is crucial that a national policy exist governing such matters. Clearly the Commission is the appropriate agency to do so and it possesses all the statutory authority necessary to adopt preemptive federal policy and rules. The Supremacy clause of the U.S. constitution, Art. VI, §2, provides that federal law is the supreme law of the land. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1818). *See also Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941), in which the Court explained that preemption can occur where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[14/] *See also City of New York v. FCC*, 486 U.S. 57, 64 (1988), holding that FCC regulations could preempt rules adopted by local franchising authorities even without explicit statutory authority and observing that "[W]hen the Federal Government acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes," *Id.* at 63; *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984) ("if the FCC has resolved to pre-empt an area of cable television regulation and if this determination 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain... we must conclude that all conflicting state regulations have been precluded." (Citation

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[14/] Similar formulations appear in other preemption cases decided by the Supreme Court. *See, e.g., Fidelity Federal Sav. & Loan Ass'n. v. De La Cuesta*, 458 U.S. 141 at 153-154 (1982).

omitted). *A fortiori* a Commission Policy Statement could preempt conflicting regulations, policies or practices adopted at the local level.

RCN believes that § 253 gives the Commission all the authority it needs to adopt a PROW Access Policy Statement that contains the elements set forth above. But even if the more cramped interpretation suggested by some courts were correct, that would not deny the Commission statutory authority to proceed. Due to the slow emergence of facilities-based competition, the Commission is continually called upon to adopt rules and policies to make the competitive mandates of Title II and Title VI a reality. The Commission has broad authority pursuant to section 4(i) of the Act[15/] to adopt such rules or policies, not otherwise inconsistent with law, as it deems necessary to implement the provisions of the Act. RCN submits that the proposed policies described above are necessary to ensure the development of end-to-end, facilities-based competition and to ensure that no American is denied access to advanced communications services.

Section 4(i) provides, in part, that the Commission may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." In the Supreme Court's recent decision interpreting the Telecommunications Act of 1996, the Court explained that:

> the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, an Act which said that "the Commission may prescribe such rules and regulations as may be necessary to carry out the provision of this Act.[16/]

[15/] 47 U.S.C. § 154(i).

[16/] *AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721, at n.5 (1999).

The 1996 Act directs the Commission to break up local monopolies and to bring competition to local markets. Thus, the Commission is empowered to use every provision of the Act in order to fulfill this mandate including Section 4(i). *See also, FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), and *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943).

When adopting its cable inside wiring rules, opposing parties argued that the forced disposition of cable home run wiring goes beyond the narrow language of §§623(b) and 624(i) of the Act, which do not encompass the sale of such wiring and restrict the Commission's authority to cable home wiring. The Commission sharply rejected these arguments, relying on its authority under §§ 4(i) and 303(r):

> We conclude that the Commission has authority under §§ 4(i) and 303(r) of the Communications Act, in conjunction with the pervasive regulatory authority committed to the Commission under Title VI, and particularly § 623, to establish procedures for the disposition of MDU home run wiring upon termination of service. The Commission may properly take action under § 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions. We invoke § 4(i) here because, contrary to the arguments posed by some commenters, the Communications Act does not prohibit the Commission from adopting procedures regarding the disposition of home run wiring and because adopting such procedures is necessary to implement several provisions of the Communications Act by effectuating and broadening the range of competitive opportunities in the multichannel video distribution marketplace.[17/]

[17/] *Telecommunications Services, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket 95-184 and MM Docket No. 92-260, 13 FCC Rcd. 3659, ¶ 83 (1997) ("*Inside Wiring Order*"), *recon. pending and appeal pending, Charter Communications, Inc. v. FCC*, Case No. 97-4120 (8th Circuit).

Similarly, RCN's proposal is not expressly prohibited by the Act and, furthermore, it is necessary to effectuate the competitive cable and telecommunications mandates of the Act.

The Commission's authority – and even obligation – to rely on its ancillary powers when unforeseen circumstances arise is reinforced in two cases arising in the U.S. Court of Appeals for the D.C. Circuit. In one case, the Commission had charged license fees to an applicant falling outside the class of applicants for which such fee authority had been granted by Congress.[18/] MTEL contended before the court that Congress' explicit grant of authority to collect fees for auctioned licences meant that the Commission lacked authority to impose fees in other contacts. The court, however, rejected this argument, finding that the "expressio unius" maxim was misplaced since it has little force in the administrative setting where deference to an agency's interpretation of a statute is appropriate unless Congress has directly spoken to the precise question at issue.[19/]

In the *MTEL* proceeding, the Commission contended that imposing a license fee on the grantee of a pioneer's preference fell within the Commission's broad authority under § 309(a) of the statute to assure that application grants were in the public interest because otherwise MTEL would be unjustly enriched and could indulge in predation in competing with auction winners who were forced to pay for licenses.[20/] Similarly, in *New England Telephone & Telegraph Co. v.*

[18/] *Mobile Communications Corp. (MTEL) v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 81.

[19/] *See id.*, 77 F.3d at 1404-5.

[20/] *Id.*

FCC,[21] the Court sustained the imposition of a refund obligation on carriers for certain charges that produced revenue in excess of an authorized rate of return, even though the Act's only provision explicitly mentioning refunds did not apply to the circumstances. The Court found that refunds were necessary to remedy the violation of the Commission's rate of return order.[22]

The 7th Circuit has also confirmed that "Section 4(i) empowers the Commission to deal with the unforeseen - even if that means straying a little way beyond the apparent boundaries of the Act - to the extent necessary to regulate effectively those matters already within the boundaries."[23] RCN is simply suggesting that the Commission similarly exercise its authority to remedy circumstances that prevent fulfillment of Congress' vision of competitive cable and telecommunications market, even if § 253 does not explicitly grant such power to the Commission.

The Commission's preemption power is similarly broad. To be sure, § 253(d) provides the Commission with preemption power only with respect to sections 253(a) and (b), and not to 253(c), which is the section containing the requirement for competitive neutrality and nondiscriminatory treatment of competitors. Whatever the correct interpretation of this statutory

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[21] 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989).

[22] *Id.* 826 F.2d at 1107-09.

[23] In *North American Telecommunications Association v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985), the Commission, relying on § 4(i), required the Bell holding companies to file capitalization plans for equipment subsidiaries, although the Communications Act conferred no authority over holding companies and the legislative history suggested that Congress had considered and rejected such authority.

structure may be,[24/] the Commission has broad preemptive powers, as outlined above, which are derived from the statutory scheme as a whole. Indeed, it is hard to imagine a factual context in which federal preemption is more clearly appropriate. Local policy and practice with respect to access to PROW varies widely among thousands of local jurisdictions, as one would expect. National policy, as reflected throughout the Act, is to promote competition. Access to local PROW, and access on competitively neutral terms and conditions, is essential for such policy to have any chance of success.

Viewed from the perspective of the multitudinous PROW administrators, it is easy to understand the preference for local variations. But wide variation in local policy and practice, as a matter of common sense, is pregnant with the possibility for unfair or inconsistent treatment. Indeed, RCN, and no doubt hundreds of other CLECs and competitive MVPDs, has already experienced delays, uncertainly, excessive costs, and other anti-competitive pressures arising from the wide variation which exists in local PROW administration. In short, federal preemption is required, and the Commission has full authority to adopt a broad, preemptive federal policy in this area.

[24/] *See, e.g.*, the *dicta* in *Cablevision of Boston v. Public Improvement Commission* to the effect that § 253 does not impose an affirmative duty on PROW administrators to assure a "level playing field." 184 F.3d 88 at 104. But the District Court in *Bell Atlantic-Maryland v. Prince George's County* accepts without discussion the duty which § 253 imposes on PROW administrators to treat all PROW users fairly and equitably. *See* slip op. at 6-11.

IV. THE COMMISSION SHOULD REQUIRE PROW ADMINISTRATORS TO ADOPT A COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY PROW ACCESS POLICY

Beyond the adoption of a federal PROW Access Policy Statement, RCN urges the Commission to require local PROW administrators to develop their own local rules, policies and practices that conform to the federal Policy Statement. Although the Commission itself has construed the provisions of § 253 broadly, and a number of federal district courts have done so as well, the *Cablevision of Boston v. Public Improvement Commission* decision, albeit in *dicta*, leaves open the question whether PROW administrators have a duty to develop a local PROW management policy that affirmatively assures a level playing field for all competitors requiring access to such facilities.[25/] RCN urges the Commission to address this issue in further proceedings. Local governments will undoubtedly contend that such a requirement violates constitutional limits on federal power over local government.[26/] Significantly, however, the Court's recent decision in *AT&T v. Iowa Utilities Board*[27/] noted that with respect to questions addressed in the 1996 Act Congress has taken the regulation of local telecommunications competition away from the States.[28/] In this context a requirement that local PROW administrators develop rules and procedures consistent with § 253 and any Communication policy adopted pursuant thereto would materially smooth the path to competitive, facilities-based entry. The Commission could significantly simplify the task for local government by developing

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[25/] *See* 184 F.3d 88 at 104-105.

[26/] *See, e.g., Printz v. U.S.*, 521 U.S. 898 (1997).

[27/] 119 S. Ct. 1022 (1999).

[28/] *Id.*, at n. 6.

explicit principles that express a broad public policy but which leave minor details to local administrators. For example, if the Commission's PROW Access Policy Statement were both to include basic principles such as those set forth above in section III, and to require local government to implement those policies affirmatively, it would substantially facilitate competitors' access to PROW without unduly burdening local PROW administrators.

RCN recognizes that requiring local PROW administrators to adopt and adhere to such an affirmative policy will impose certain costs and constraints on them. At the same time, however, the implementation of such a policy nationally will undoubtedly encourage more competitive entry, facilitate faster entry, and eliminate the enormous disparity which exists today between ILEC or incumbent MVPD access to and use of PROW and that of CLECs or competitive MVPDs. This, in turn, will help materially to fulfill Congressional policy, and will advance the interests of all Americans in the development of a telecommunications infrastructure that is adequate to meet the needs of an information-intensive economy.

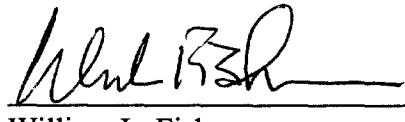
V. CONCLUSION

RCN urges the Commission to adopt a PROW Access Policy Statement and to preempt conflicting or inconsistent local rules or practices. The development of such a federal policy is urgent to overcome the wide disparity in local PROW administration, and to assure that competitive entrants have a fair opportunity to develop their competitive offerings through use of PROW resources. Any such policy should provide certain fundamental protections to all PROW users or applicants for such use. These protections involve competitive equality among all carriers or MVPDs, rapid action upon the filing of a request for PROW access, and access fees

based strictly on the costs imposed on local governments by those requesting access to or use of such PROW facilities. The Commission should also consider requiring local PROW administrators to adopt local rules and policies designed to implement § 253 and the Commission's PROW Access Policy Statement.

Respectfully submitted,

RCN TELECOM SERVICES, INC.

By: 

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October 12, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comments of RCN Telecom Services, Inc. was hand delivered this 12th day of October 1999, to the following:

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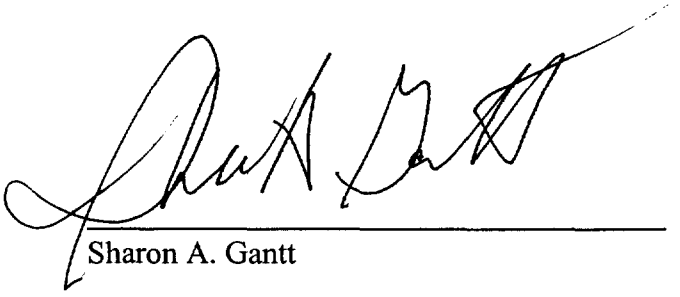

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